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UNIVERSITY OF VIRGINIA SCHOOL OF LAW
JOHN M. OLIN FOUNDATION

SYMPOSIUM ON LAW AND ECONOMICS OF LOCAL GOVERNMENT

DOUGLAS LESLIE
SYMPOSIUM EDITOR

DIRECT DEMOCRACY AND DISCRIMINATION: A PUBLIC CHOICE PERSPECTIVE

Lynn A. Baker 707

Professor Baker uses public choice theory to show that a rationally self-interested racial minority's preference between representative and direct lawmaking processes is a difficult empirical question that cannot be confidently resolved on the strength of *a priori* reasoning. She then considers commentators' suggestions that plebiscitary legislation receive "a harder judicial look" under equal protection doctrine than the enactments of representative bodies, and concludes that this disparate judicial treatment is neither necessary nor desirable.

REPRESENTATIVE GOVERNMENT: THE PEOPLE'S CHOICE

Julian N. Eule 777

This Article argues that Professor Baker's defense of direct democracy ignores the constitutional assumptions about the form of decision-making that best protects unpopular minorities from majority neglect of subordination. The Constitution has a structural preference for representative government. Furthermore, according to the author, the Framers got it right.

COMMENT ON BAKER, "DIRECT DEMOCRACY AND DISCRIMINATION: A PUBLIC CHOICE PERSPECTIVE"

William H. Riker 791

An important difference in law-making between representative and plebiscitary institutions is that in representative institutions the legislature as a whole participates in setting the agenda while in plebiscitary institutions the interest group proposing the referendum controls the agenda.

Since agendas often determine outcomes, as parliamentmen will understand, the plebiscitary institutions effectively transfer the authority to set the content of statutes from representatives to interest groups. This fact suggests that courts can use the history of a plebiscite to identify groups advantaged and disadvantaged by plebiscitary institutions.

DECONCENTRATING THE INNER CITY POOR

Michael H. Schill 795

In recent years, concentrated poverty in many inner cities has increased dramatically generating an array of social problems different in both magnitude and kind from those that are normally associated with low income households. In this Article, Professor Schill argues in favor of legal doctrines and public policies that would facilitate and encourage the migration of poor, inner city residents to the suburbs. In addition to examining the efficiency consequences of deconcentration strategies, an empirical analysis comparing the neighborhood and housing circumstances of poor urban and suburban residents is presented. The results of the study suggest that poor, inner city residents would benefit from living in the suburbs.

THE POLICY IMPLICATIONS OF THE SPATIAL MISMATCH HYPOTHESIS: COMMENT ON "DECONCENTRATING THE INNER CITY POOR"

John C. Weicher 855

The spatial mismatch hypothesis remains unproven, and as a matter of housing and urban policy it is extremely difficult to identify specific urban jurisdictions with a mismatch. But whether it is valid or not, the hypothesis is not necessary to justify efforts to deconcentrate poor families; nor is deconcentration the only way to improve their living conditions.

COMMENTS ON "DECONCENTRATING THE INNER CITY POOR," BY MICHAEL SCHILL

Edwin S. Mills 861

Professor Schill's Article is excellent. He discusses carefully every legal and political issue related to attempts to integrate U.S. suburbs. Neither Professor Schill's prognosis nor the author's is very optimistic.

EXPLORING THE KOZINSKI PARADOX: WHY IS MORE EFFICIENT REGULATION A TAKING OF PROPERTY?

William A. Fischel 865

Judge Alex Kozinski once distinguished mobile home rent control from conventional rent control by noting that the greater inefficiency of the latter saved it from being an unconstitutional taking. This Article extends his paradox by arguing that both pluralistic politics and the threat of exit, which are often considered to cause economic inefficiency, usually serve to keep the burdens of regulation from rising to compensable takings of property. The paradox identifies a principled and limited instance in which judges rather than the political process must be relied upon to preserve constitutional liberties.

THE PERILS OF PARADOXES—COMMENT ON WILLIAM A. FISCHEL, "EXPLORING THE KOZINSKI PARADOX: WHY IS MORE EFFICIENT REGULATION A TAKING OF PROPERTY?"

Vicki Been 913

Professor Been agrees with Professor Fischel that the takings inquiry should pay attention to the ability of property owners to protect themselves in the political arena. She argues, however, that the best measure of that ability is the availability of exit and voice options for the property owner, rather than the notion of "comparative efficiency" advanced by Professor Fischel.

REGULATORY TAKINGS: THE CASE OF MOBILE HOME RENT CONTROL

Daniel L. Rubinfeld 923

This Article argues that there is no contradiction in Judge Kozinski's distinction between the relative efficiency of mobile home rent control and the suggestion that there ought to be a regulatory taking. From a normative perspective a substantial rational basis test is appropriate; this test may bear little relationship to the efficiency of the regulation. From a positive perspective, the Court seems unlikely to accept the physical invasion approach urged by Judge Kozinski.

IS RENT CONTROL GOOD SOCIAL POLICY? *Edgar O. Olsen* 931

This Article confronts arguments for rent control with evidence on its effects and on the workings of housing markets. It finds no justification for transfers from owners of rental housing to their tenants, and it shows that rent control is a poorly focused and highly inefficient redistributive device.

RENT CONTROL: A COMMENT ON OLSEN *Robert C. Ellickson* 947

In his Comment, Professor Robert C. Ellickson urges analysts to pay more attention to the second-order consequences of rent control, such as its effects on labor markets, commuting costs, and municipal politics. Professor Ellickson also critiques Margaret Jane Radin's defenses of rent control.

COMMENTS ON EDGAR OLSEN'S "IS RENT CONTROL GOOD SOCIAL POLICY?" *Harvey S. Rosen* 955

Rent control neither enhances economic efficiency nor leads to a more equitable distribution of income. Hence, according to the theory of welfare economics, it is undesirable social policy.

IN PARTIAL PRAISE OF DILLON'S RULE, OR, CAN PUBLIC CHOICE THEORY JUSTIFY LOCAL GOVERNMENT LAW? *Clayton P. Gillette* 959

Dillon's Rule, which restricts the capacity of local governments to initiate legislation without state authorization, has been a controversial doctrine in local government law. In this Article, Professor Clayton Gillette argues that the Rule can best be justified as a mechanism by which courts restrain localities from legislating in the interests of a discrete group. Professor Gillette then demonstrates that the desire to protect underrepresented groups explains other judicially created doctrines in local government law.

HOME RULE, MAJORITY RULE, AND DILLON'S RULE *Richard Briffault* 1011

Professor Gillette's "public choice theory" does not "justify" Dillon's Rule because it fails to consider fully the significance of the small size of most local governments. Majority rule, rather than manipulation by special interest minorities, is characteristic of the small residential communities which are the principal setting for local government in contemporary America. Dillon's Rule allows state courts to displace municipal home rule, yet there is no evidence that the Rule is a useful mechanism for suppressing manipulation or enhancing the quality of local deliberation.

REVIEWING AND REVISING DILLON'S RULE *Gary T. Schwartz* 1025

This Comment indicates that Professor Gillette's treatment of Dillon's Rule is not really an account of how that Rule has been interpreted in the past, but rather a recommendation for how the Rule should be administered in the future. Yet the Comment goes on to suggest that this recommendation, at least in its current form, is not persuasive.

NOTES

MODEL FEDERAL STATUTE FOR THE EDUCATION OF TALENTED AND GIFTED CHILDREN

Mary Lou Herring 1035

A valuable resource, our talented and gifted children, are not receiving adequate education to enable them to reach their potential contribution to society. The educational needs of our global society must be addressed on a federal level. Therefore, this Note proposes a federal education statute for talented and gifted children.

THE NEED TO CONSIDER CHILDREN'S RIGHTS IN BIOLOGICAL PARENT V. THIRD PARTY CUSTODY DISPUTES

James G. O'Keefe 1077

In child custody disputes between biological parents and third parties, there is a jurisdictional split regarding whether the best interest of the child standard or the parental rights standard is used. In the parental rights standard, the best interest of the child is not considered unless the biological parent is proven to be unfit. This Note argues that given recent developments in the law, in science, and in the theory of human development, use of the parental rights standard is no longer supportable.

THE IDENTICAL TREATMENT OF OBSCENE AND INDECENT SPEECH: THE 1991 NEA APPROPRIATIONS ACT

Stephen N. Sher 1107

This Note asserts that the provision in the 1991 National Endowment of the Arts Appropriations Bill requiring the NEA to consider "general standards of decency" before allotting grants to artists is an unconstitutional infringement of the first amendment because it restricts protected speech. Congress inserted this so called "decency provision" into the Bill to curb fundamentalists who opposed NEA funding of various "lewd" exhibits. As it is the duty of the Legislature to represent the views of the majority, it is the duty of the Judiciary to protect minority views by enforcing the Constitution, especially the Bill of Rights. The first amendment mandates that "Congress shall pass no law . . . abridging the freedom of speech." The Supreme Court has fully protected some forms of speech from infringement (e.g., political), while not shielding other speech (e.g., obscene). The Note concludes that while indecent speech is on the borderline between protected and unprotected speech, indecent *artistic* speech should fall on the protected side. Thus, because it targets indecent artistic speech, the decency provision unconstitutionally infringes free speech.

The Note first places the current turmoil surrounding the NEA in historical perspective by briefly tracing the chronology of American arts funding, focusing specifically on the 1989 and 1991 NEA Appropriations Bills. Then the Note explains the distinction between content-neutral and content-based regulations, concluding that the decency provision is content-based. Next the Note describes that the amount of protection afforded to speech depends upon where that speech falls in the first amendment hierarchy; the Note determines that the decency provision targets not unprotected obscene speech but instead protected indecent speech. Additionally, the Note points out that Congress did not adequately define decency, thus making the Bill unconstitutionally vague because people of "common intelligence" have to "guess as to its meaning." The Note also refutes the argument that this restriction is constitutional because it is merely a condition placed on a subsidy. Finally, the Note concludes by suggesting alternatives that would uphold Congress's preference to prevent the funding of obscene art without infringing the Constitution.

**UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
JOHN M. OLIN FOUNDATION

SYMPOSIUM ON
LAW AND ECONOMICS OF
LOCAL GOVERNMENT**

**Douglas Leslie
Symposium Editor**

THE JOHN M. OLIN PROGRAM IN LAW AND ECONOMICS

The John M. Olin Program in Law and Economics at the University of Virginia is funded by the John M. Olin Foundation of New York. The program was established to take advantage of faculty interests and talents in the area of law and economics. The program reflects a mixture of teaching activities and scholarly research relating to the economic analysis of legal issues by supporting the following activities: lectures, academic conferences and workshops, conferences for lawyers, judges and other members of the legal community and support for student research in law and economics.

This symposium is based on papers presented at the John M. Olin Conference on "Law and Economics of Local Government" held at the University of Virginia School of Law on November 8-9, 1991.

The editors and staff of the Chicago-Kent Law Review wish to express their appreciation to the John M. Olin Foundation, Professor Douglas Leslie, Director, and Joyce Holt, Administrator, as well as the University of Virginia, for the opportunity to publish this symposium.

**SYMPOSIUM ON
THE SEVENTH CIRCUIT
AS A CRIMINAL COURT**

**Adam H. Kurland
Symposium Editor**

